

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARIN ALLEN MACK,

Petitioner,

v.

PATRICK COVELLO,

Respondent.

No. 2:23-cv-1998 DB

ORDER

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. §2254. Both parties consented to the jurisdiction of a magistrate judge. Accordingly, Chief Judge Mueller authorized the undersigned magistrate judge to rule on all proceedings in this action. (ECF No. 9.)

On November 17, 2023, respondent filed a motion to dismiss the petition for failure to exhaust state remedies. (ECF No. 10.) In an order filed April 25, 2024, this court found petitioner failed to exhaust one claim in his petition – that his appellate counsel was ineffective for failing to raise legal issues regarding petitioner’s sentence. This court gave petitioner the opportunity to choose to proceed solely on the exhausted claims in his petition or seek a stay of these proceedings. (ECF No. 14.) On May 15, 2024, petitioner filed a motion for a stay. (ECF No. 15.) In response, respondent filed a statement of non-opposition to a stay of these proceedings under Rhines v. Weber, 544 U.S. 269 (2005). (ECF No. 16.)

1 A Rhines stay is available where (1) good cause is shown for petitioner's failure to have
2 exhausted all claims in state court prior to filing the federal petition, (2) the unexhausted claim or
3 claims potentially have merit, and (3) there is no indication that petitioner has intentionally
4 delayed pursuing the litigation. Rhines, 544 U.S. at 277-78. If petitioner makes this showing, the
5 district court stays the petition in its entirety, without requiring dismissal of any unexhausted
6 claims, while the petitioner attempts to exhaust them in state court. King v. Ryan, 564 F.3d 1133,
7 1138-41 (9th Cir. 2009).

8 Based on petitioner's opposition to the motion to dismiss and motion for a stay, this court
9 finds petitioner made good faith attempts to exhaust his ineffective assistance of appellate counsel
10 claim in state court prior to filing his federal petition. Further, that claim may have merit and it is
11 evident petitioner is attempting to pursue his claims in a timely manner.

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. Petitioner's motion for stay and abeyance of these proceedings (ECF No. 15) is
14 granted;
- 15 2. Respondent's motion to dismiss (ECF No. 10) is dismissed as moot; and
- 16 3. Petitioner shall file a notice with this court within thirty days of a decision by the
17 California Supreme Court on his exhaustion petition.

18 Dated: June 13, 2024

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22 DEBORAH BARNES
23 UNITED STATES MAGISTRATE JUDGE
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